

176 FERC P 61069 (F.E.R.C.), 2021 WL 3401359

FEDERAL ENERGY REGULATORY COMMISSION
*1 Commission Opinions, Orders and Notices

Before Commissioners: Richard Glick, Chairman; Neil Chatterjee, James P. Danly, Allison Clements, and Mark C. Christie.

Cherokee County Cogeneration Partners, LLC

Docket No. ER21-304-002

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING
(Issued August 3, 2021)

1. This order addresses Cherokee County Cogeneration Partners, LLC's (Cherokee) request for rehearing of the Commission's April 2, 2021 order,¹ in which the Commission dismissed Cherokee's submission of a new rate schedule (Reactive Rate Schedule),² filed pursuant to section 205 of the Federal Power Act (FPA),³ setting forth a proposed cost-based revenue requirement for Reactive Supply and Voltage Control from Generation Sources Service (Reactive Service).
2. Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,⁵ we are modifying the discussion in the April 2021 Order and continue to reach the same result in this proceeding, as discussed below.⁶

I. Background

3. Cherokee owns and operates the Cherokee Energy Center (Facility), which is a Qualifying Facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA).⁷ Cherokee sells capacity and energy from the Facility to Duke Energy Carolinas, LLC (DEC) under a Power Purchase Agreement (PPA), which was initially scheduled to expire on December 31, 2020, but has since been extended until the earlier of an ongoing state proceeding concerning the PPA, or August 29, 2021.⁸
4. Cherokee and DEC are parties to a Large Generator Interconnection Agreement (LGIA) providing for the interconnection of the Facility to DEC's system.⁹ Cherokee states that the LGIA requires Cherokee to provide Reactive Service to DEC with compensation to be set forth in the Reactive Rate Schedule at issue in this proceeding.¹⁰ On November 2, 2020, Cherokee filed the proposed Reactive Rate Schedule with the Commission. Cherokee also invoked the Commission's Reactive Service comparability standard, which is set forth in Order No. 2003-A¹¹ and requires that a transmission provider pay for Reactive Service within the established power factor range¹² to the extent the transmission provider pays its own or affiliated generators for that service.¹³
5. In the April 2021 Order, the Commission dismissed Cherokee's Reactive Rate Schedule after finding that the LGIA, through which Cherokee claimed entitlement to compensation for Reactive Service, was not subject to the Commission's jurisdiction.¹⁴ The Commission stated that, as explained in Order No. 2003, where a "utility is obligated to interconnect under [18 C.F.R. § 292.303], that is when it purchases the QF's total output, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs."¹⁵ Having found that Cherokee sells all of its output to DEC under the PPA and has no express right to sell any of its output to a third party, the Commission concluded that the LGIA is subject to the jurisdiction of the Public Service Commission of South Carolina (South Carolina Commission).¹⁶

II. Rehearing Request

***2** 6. On rehearing, Cherokee argues that the Commission's determination concerning the jurisdictional status of the LGIA is neither correct nor relevant. Cherokee argues that its interconnection with DEC is not subject to [18 C.F.R. § 292.303 \(2020\)](#), and that the Commission therefore has jurisdiction over the LGIA, because Cherokee's Facility is not selling its ““entire output” under the PPA.¹⁷ Cherokee asserts that it is also making Reactive Service sales, albeit at a price of zero, under the LGIA and that those sales “have not been made pursuant to the PPA or otherwise under subpart C of Part 292 of the Commission's regulations.”¹⁸ In further support of its argument that the Commission has jurisdiction over the LGIA, Cherokee references provisions in the LGIA describing the parties' respective rights to make filings under sections 205 and 206 of the FPA.¹⁹

7. Cherokee also disputes the Commission's finding that “there is nothing in the record indicating that Cherokee plans to sell to a third party.”²⁰ Cherokee alleges that the Commission failed to recognize the jurisdictional impact of the scheduled expiration of the PPA, along with the fact that Cherokee has obtained and retained market-based rate authority.²¹ Cherokee argues that these circumstances collectively demonstrate a “manifestation of a ‘plan to sell’ output to third parties” such that Commission jurisdiction should attach to the LGIA.²²

8. In addition, Cherokee contends that the jurisdictional status of the LGIA is irrelevant and has no bearing on whether the Commission has jurisdiction over the Reactive Service that Cherokee provides to DEC.²³ Cherokee argues that the Commission mischaracterized Cherokee's rate application in stating that “Cherokee's only asserted basis for entitlement to compensation for Reactive Service is the LGIA.”²⁴ Instead, Cherokee claims that the principal basis for Cherokee's entitlement to compensation is the Commission's comparability standard, which, according to Cherokee, “applies regardless of whether it has been incorporated into the LGIA or not and regardless of the jurisdictional status of the LGIA.”²⁵ Cherokee argues that the Commission's dismissal of its filing violated the comparability standard and unlawfully deprived Cherokee of its rights as a public utility to make rate filings under section 205 of the FPA.²⁶ By denying Cherokee the opportunity to receive any compensation for Reactive Service, Cherokee contends that the Commission “violated the statutory command that rates for Commission-jurisdictional services, such as Reactive Service, provided by public utilities, like Cherokee, be just and reasonable and not unduly discriminatory or preferential.”²⁷

III. Discussion

A. Procedural Matters

***3** 9. On May 13, 2021, DEC submitted a motion for leave to answer and answer in response to Cherokee's rehearing request. On May 27, 2021, Cherokee filed an answer opposing DEC's motion for leave to answer. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.²⁸ Accordingly, we deny DEC's motion to answer and reject its answer.

B. Substantive Matters

10. We continue to find that the Commission's dismissal of Cherokee's proposed Reactive Rate Schedule is appropriate. As discussed below, we sustain the Commission's finding that the LGIA, which governs the interconnection of the Facility to DEC's system, is not subject to the Commission's jurisdiction. We further find that Cherokee's proposed Reactive Rate Schedule is not subject to Commission review under section 205 of the FPA and that Cherokee's arguments concerning comparability are therefore moot.

1. Jurisdictional Status of the LGIA

11. We continue to find that the LGIA is not subject to the Commission's jurisdiction and is instead subject to the jurisdiction of the relevant state authority, in this case, the South Carolina Commission.²⁹ As the Commission explained in the April 2021 Order, when an electric utility (in this case DEC) interconnecting with a QF (in this case Cherokee) purchases the total output of that QF, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs.³⁰ Cherokee argues that Commission jurisdiction should attach to the LGIA based on Cherokee's claim that Reactive Service occurs under the LGIA and that Cherokee therefore does not sell its "total output" under the PPA.³¹ We disagree. In Order No. 2003, the Commission explained that it "has jurisdiction over a QF's interconnection to a Transmission System if the QF's owner sells any of the QF's output to an entity other than the electric utility directly connected to the QF."³² Accordingly, the standard for determining Commission jurisdiction turns on whether any of the QF's output is sold to third parties, not on whether the full output is sold pursuant to one particular agreement. Here, even if Cherokee is selling reactive power service to DEC at zero cost pursuant to the LGIA as Cherokee alleges, Cherokee is still selling all of its power to DEC. Since no output is being provided to third parties in interstate commerce, Commission jurisdiction does not attach to Cherokee's interconnection with DEC.

12. The Commission has stated that it will exercise jurisdiction over a QF interconnection "only if there is some manifestation of a QF's 'plan to sell' output to third parties" and that such manifestation could include "a QF's request for wheeling service or a contract providing the QF an express right to sell output to third parties."³³ We continue to find that there is nothing in the record that would support either of these manifestations of a "'plan to sell.'" As discussed in the April 2021 Order, the terms of the PPA contain no express right for Cherokee to sell any of its output to a third party.³⁴ Moreover, Cherokee has offered no evidence that it has requested transmission service to transmit its power over DEC's transmission system to deliver to third parties. Without this demonstration, the upcoming expiration of the PPA does not constitute a manifestation of a "plan to sell" to third parties, and there is nothing to suggest that upon expiration of the PPA, Cherokee will not enter into a new PPA with DEC pursuant to South Carolina's implementation of section 210 of PURPA.³⁵ In addition, contrary to Cherokee's rehearing argument,³⁶ securing and retaining market-based rate authority is not dispositive of an intent to sell, and, in fact, entities have filed applications for market-based rate authority purely out of an abundance of caution.³⁷

*4 13. We are also unpersuaded by Cherokee's argument that the Commission would possess jurisdiction over the LGIA based on references in the LGIA to the parties' respective rights to make filings under sections 205 and 206 of the FPA.³⁸ Such references do not convert a non-jurisdictional agreement into a jurisdictional one.³⁹

2. Applicability of Section 205 of the FPA and the Comparability Standard

14. We disagree that the Commission's dismissal of Cherokee's filing "unlawfully deprived Cherokee of its rights as a public utility to make rate filings under [s]ection 205 of the FPA."⁴⁰ As discussed below, we find that Cherokee's Reactive Rate Schedule is exempt from Commission scrutiny under section 205 of the FPA pursuant to 18 C.F.R. § 292.601(c)(1) (2020).⁴¹ Accordingly, we sustain our determination to dismiss Cherokee's proposed Reactive Rate Schedule on jurisdictional grounds, and we therefore find that Cherokee's comparability arguments are moot.

15. As amended by Order No. 671,⁴² 18 C.F.R. § 292.601(c)(1) currently provides that "sales of energy or capacity made by qualifying facilities ... pursuant to a state regulatory authority's implementation of section 210 of [PURPA], shall be exempt from scrutiny under sections 205 and 206." Cherokee argued in its answer that its Reactive Rate Schedule is subject to Commission scrutiny under section 205 of the FPA pursuant to 18 C.F.R. § 292.601(c)(1) because sales of Reactive Service are distinct from sales of "'energy and capacity'" as those terms are used in the regulatory text of 18 C.F.R. § 292.601(c)(1).⁴³ Cherokee also argued that applying the exemption from section 205 of the FPA to Reactive Service would be inconsistent with *Sagebrush*,⁴⁴ in which the Commission determined that the exemption from section 205 of the FPA in 18 C.F.R. § 292.601(c)(1) applied to "sales of energy or capacity" and did not extend to a QF's sale of transmission service.⁴⁵ We are unpersuaded by Cherokee's

arguments and find that the exemption from section 205 of the FPA provided for in [18 C.F.R. § 292.601\(c\)\(1\)](#) extends to Cherokee's sales of Reactive Service, as discussed further below.

16. While the regulatory text of [18 C.F.R. § 292.601\(c\)\(1\)](#) refers to sales of "energy and capacity," the discussion in Order No. 671 provides that the exemption from section 205 of the FPA applies to sales of "electric energy" made pursuant to a state regulatory authority's implementation of section 210 of PURPA.⁴⁶ Furthermore, the Commission has stated that "[i]n the context of PURPA, the term energy includes capacity, energy *and ancillary services*."⁴⁷ Here, Cherokee proposes to provide a service (Reactive Supply and Voltage Control from Generation Sources) that it claims is currently being provided by DEC and its affiliated generators as an ancillary service under Schedule 2 of the DEC Joint Open Access Transmission Tariff.⁴⁸ Accordingly, we find that the exemption from section 205 of the FPA provided for in [18 C.F.R. § 292.601\(c\)\(1\)](#) for "sales of energy or capacity" that are "made pursuant to a state regulatory authority's implementation of section 210 of [PURPA]" also encompasses the Reactive Service at issue here.

***5** 17. Contrary to Cherokee's argument, our finding is not inconsistent with *Sagebrush*, where the Commission drew a distinction between a QF's sale of transmission service on the one hand and the sale of "energy or capacity" on the other. As discussed above, in the context of PURPA, the latter category includes Reactive Service. While sales of ancillary services, including the Reactive Service at issue here, fall within the exemption from section 205 of the FPA specified in [18 C.F.R. § 292.601\(c\)\(1\)](#), sales of transmission services do not because transmission service is not among the services addressed in [section 292.601\(c\)\(1\)](#).⁴⁹

18. Finally, we turn to Cherokee's argument regarding the comparability standard. As the Commission recognized in Order No. 2003-A, the comparability standard is rooted in the not unduly discriminatory principles of FPA.⁵⁰ Given our finding that Cherokee's LGIA is not subject to the Commission's jurisdiction under the FPA, and therefore not subject to Order No. 2003 and its progeny, Cherokee's argument for entitlement to compensation for Reactive Service under the comparability standard set forth in Order No. 2003-A is moot.

The Commission orders:

In response to Cherokee's rehearing request, the April 2021 Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

(SEAL)

Debbie-Anne A. Reese
Deputy Secretary

Footnotes

1 *Cherokee Cnty. Cogeneration Partners, LLC*, 175 FERC ¶ 61,002 (2021) (April 2021 Order).

2 Cherokee County Cogeneration Partners, LLC, Reactive Rate Schedule, Rate Schedule FERC No. 1 (0.0.0).

3 16 U.S.C. § 824d.

4 964 F.3d 1 (D.C. Cir. 2020) (en banc).

- 5 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection
 (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set
 aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).
- 6 *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the April 2021 Order. *See*
 Smith Lake Improvement & Stakeholders Ass’n v. FERC, 809 F.3d 55, 56-57 (D.C. Cir. 2015).
- 7 April 2021 Order, 175 FERC ¶ 61,002 at P 2.
- 8 *Id.* P 3 & n.7; Rehearing Request at 5.
- 9 April 2021 Order, 175 FERC ¶ 61,002 at P 3.
- 10 *Id.* P 4.
- 11 *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003),
 order on reh’g, Order No. 2003-A, 106 FERC ¶ 61,220, order on reh’g, Order No. 2003-B, 109 FERC ¶ 61,287 (2004),
 order on reh’g, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), aff’d sub nom. *Nat'l Ass'n of Regulatory Util. Comm'r's v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), cert. denied, 552 U.S. 1230 (2008).
- 12 The required power factor range refers to the requirement in Article 9.6.1 of the *pro forma* LGIA that a generator design
 its facility to maintain a composite power delivery at a continuous rated power output within the range of 0.95 leading
 to 0.95 lagging, unless the transmission provider has established different requirements. *See* Order No. 2003, 104 FERC
 ¶ 61,103 at PP 540, 542.
- 13 April 2021 Order, 175 FERC ¶ 61,002 at P 12 n.27.
- 14 *Id.* PP 16-17.
- 15 *Id.* P 17 (quoting Order No. 2003, 104 FERC ¶ 61,103 at P 813).
- 16 *Id.* P 18.
- 17 Rehearing Request at 9-10.
- 18 *Id.* at 10.
- 19 *Id.*
- 20 *Id.* at 12 (citing April 2021 Order, 175 FERC ¶ 61,002 at P 18).
- 21 *Id.* at 11-12.
- 22 *Id.* at 12 (citing *Fla. Power & Light Co.*, 133 FERC ¶ 61,121, at P 21 (2010)).
- 23 *Id.* at 8.
- 24 *Id.* at 5-6 (citing April 2021 Order, 175 FERC ¶ 61,002 at P 16).
- 25 *Id.* at 6.
- 26 *Id.* at 7 (citing *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002)).
- 27 *Id.* at 13.
- 28 18 C.F.R. § 385.713(d)(1) (2020).
- 29 April 2021 Order, 175 FERC ¶ 61,002 at PP 16-18.
- 30 *Id.* P 17 (citing Order No. 2003, 104 FERC ¶ 61,103 at P 813).
- 31 Rehearing Request at 9-10.
- 32 Order No. 2003, 104 FERC ¶ 61,103 at P 814.
- 33 *Fla. Power & Light Co.*, 133 FERC ¶ 61,121 at PP 21-22.
- 34 April 2021 Order, 175 FERC ¶ 61,002 at P 18 (citing DEC Protest at 9-11; PPA §§ 3.1-3.3).
- 35 16 U.S.C. § 824a-3.
- 36 *See supra* P 7.
- 37 *See, e.g., Berry Petroleum Co.*, 143 FERC ¶ 61,223, at PP 9, 14 (2013) (*Berry Petroleum*) (finding on rehearing that
 applicant’s market-base rate authorization and corresponding request for waiver of prior notice was unnecessary because
 the underlying agreement was exempt from section 205 of the FPA); *EnergyConnect, Inc.*, 130 FERC ¶ 61,031, at PP
 5, 29 (2010) (granting market-based rate authority to a demand response provider based on representation that it *may* at
 times buy ancillary services from generation sources for eventual resale in organized markets).
- 38 *See supra* P 6; Rehearing Request at 10.
- 39 *See Luzenac Am., Inc.*, 121 FERC ¶ 61,084, at P 32 (2007) (stating that “in determining whether a contract contemplates
 wholesale transactions subject to [the Commission’s] jurisdiction, the Commission is required to focus on the substance

of these transactions, not simply the parties' contractual recitations"), *order on reh'g*, 123 FERC ¶ 61,027, at P 13 (2008) (same).

40 Rehearing Request at 2, 7-8.

41 18 C.F.R. § 292.601(c)(1) (stating in relevant part that "sales of energy or capacity made by qualifying facilities ... pursuant to a state regulatory authority's implementation of section 210 of [PURPA], shall be exempt from scrutiny under sections 205 and 206").

42 *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 114 FERC ¶ 61,102, *order on reh'g*, Order No. 671-A, 115 FERC ¶ 61,225 (2006).

43 Cherokee Answer at 10; April 2021 Order, 175 FERC ¶ 61,002 at P 12.

44 130 FERC ¶ 61,093, at P 25, *order on reh'g & compliance*, 132 FERC ¶ 61,234 (2010).

45 Cherokee Answer at 13-14.

46 See Order No. 671, 114 FERC ¶ 61,102 at PP 96, 99 (stating that "the broad nature of the exemptions currently set forth in 18 C.F.R. § 292.601(c)(1) removes a large number of *electric energy* sales from any regulatory oversight" and that "a QF which sells *electric energy* pursuant to a state regulatory authority avoided-cost ratemaking regime would remain exempt from sections 205 and 206 of the FPA" (emphasis added)).

47 *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697-A, 123 FERC ¶ 61,055, at P 524 n.869 (2008) (emphasis added).

48 Cherokee Answer at 2. In issuing Order No. 888, the Commission adopted "Reactive Supply and Voltage Control from Generation Sources" as the name for an ancillary service. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,703 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); see also *Third-Party Provision of Ancillary Servs.; Accounting and Fin. Reporting for New Elec. Storage Techs.*, Order No. 784, 144 FERC ¶ 61,056, at P 6 (2013) (recognizing that "the transmission provider is not always uniquely qualified to provide the [ancillary] services and customers may be able to more cost-effectively self-supply them or procure them from other entities.").

49 Our finding also is supported by *Berry Petroleum*, in which the Commission determined that a QF making sales pursuant to a state regulatory authority's implementation of section 210 of PURPA need not file a market-based rate tariff as a prerequisite for selling not only energy and capacity, but also ancillary services. See *Berry Petroleum*, 143 FERC ¶ 61,223 at PP 2, 14. As evident from that decision, the Commission interpreted the exemption from section 205 of the FPA in 18 C.F.R. § 292.601(c)(1) as including sales of ancillary services within "sales of energy or capacity."

50 Order No. 2003-A, 106 FERC ¶ 61,220 at P 83 ("It is a fundamental requirement of FPA Sections 205 and 206 that a public utility provide comparable service to non-Affiliates, and we do indeed expect it to provide this service."); see also *Ala. Mun. Elec. Auth. v. FERC*, 662 F.3d 571 (D.C. Cir. 2011) (describing the Commission's transmission pricing comparability principle as "a policy adopted in fulfillment of provisions of the Federal Power Act requiring that all rates subject to FERC's jurisdiction be 'just and reasonable' and forbidding 'undue prejudice or disadvantage' in ratemaking").

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